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U.S. Department of Justice

Immigration and Naturalization Service

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 113 50507 Office: Vermont Service Center Date: FEB 25 2003

IN RE: Petitioner: [redacted]
Beneficiary:

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a caterer. It seeks to employ the beneficiary permanently in the United States as a specialty cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits a letter from a certified public accountant.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered beginning on priority date, the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted for processing on December 8, 1997. The beneficiary's salary as stated on the labor certification is $17.61 per hour which equals $36,628.80 annually.

With the petition, counsel submitted (1) photocopies of statements of account and invoices for orders from various wholesale food distributors and of checks to those wholesalers, (2) photocopies of contracts for provision of catering services, (3) the petitioner's 1997 Form 1099, showing payments received from other caterers, and (4) documents pertinent to the petitioner's tax status and to its unemployment insurance. Those photocopies tend to confirm that the petitioner is in the catering business.

Because the petitioner provided no evidence of its ability to pay the proffered wage, the Vermont Service Center, on August 14, 2001, sent the petitioner a Request For Evidence requesting evidence of that ability.

In response, counsel submitted copies of the petitioner's 1997 Form 1120 U.S. Corporation Income Tax Return and 2000 Form 1120S U.S. Income Tax Return for an S Corporation. The 1997 return actually covers the period from March 1, 1997 to February 28, 1998, and the 2000 return covers the 2000 calendar year. Counsel did not state why he did not provide the petitioner's returns for the years 1998 and 1999.

Counsel also submitted a printout of the petitioner's payroll information and a letter, dated November 6, 2001, from a certified public accountant. That letter states that the petitioner had the ability to pay the proffered wage during 2000 because, if permitted to hire the beneficiary, the petitioner would have reduced the officers' salaries to pay that wage.

The petitioner's 1997 Form 1120 return reflects gross receipts of $817,249; gross profit of $213,923; compensation of officers of $39,000; salaries and wages paid of $78,042; and a taxable income before net operating loss deduction and special deductions of $1,792. Schedule L reflected total current assets of $7,031 and total current liabilities of $34,235. The difference of -$27,204 is the value of the petitioner's net current assets at the end of that fiscal year.

The petitioner's 2000 Form 1120S return reflects gross receipts of $850,262; gross profit of $193,719; compensation of officers of $97,600; salaries and wages paid of $53,719; and an ordinary income (loss) from trade or business activities of -$11,024. Schedule L reflected total current assets of $11,053 and total current liabilities of $153,135. The difference of -$142,082 represents the petitioner's net current assets at the end of that calendar year.

The director determined that the evidence submitted did not

establish that the petitioner had the ability to pay the proffered wage and, on May 15, 2002, denied the petition.

On appeal, counsel submitted another letter, this one dated June 10, 2002, from the petitioner's accountant. In this letter, the accountant stated that, in his opinion, the petitioner had the ability, on December 8, 1997, to pay the proffered wage.

The accountant stated that a portion of the $519,863 shown as "Purchases" on page two of the petitioner's 1997 tax return represents payments for food prepared by other companies, and that this amount would be at least $25% lower if the petitioner did not need to purchase prepared food from other caterers. The accountant implied that hiring the beneficiary would obviate those purchases. The accountant submitted no evidence that 25% of that amount was spent on purchases of prepared food, or that the beneficiary, if hired, would obviate the necessity of purchasing any prepared food. The accountant did not state whether that change in procedure would change any other expenses, such as the expense of raw food to be prepared.

The accountant further stated that the amount shown on that same page of the petitioner's 1997 tax return as "Other Costs" includes about $19,000 of compensation paid to contractors for helping with the cooking, and that this expense, too, would be eliminated if the petitioner is permitted to hire the beneficiary.

Further still, the accountant stated that common experience dictates that efficient operation of a business similar to the petitioner's requires an expenditure of approximately 20% of the gross income on payroll, and notes that the petitioner's payroll expense falls short of that amount. The accountant reasoned that the petitioner's business would be more efficient, and more profitable, if it were permitted to hire the beneficiary. The accountant concludes that hiring the beneficiary makes economic sense.

The accountant states that the petitioner's officers are interested in expanding, and that hiring the beneficiary will accommodate that interest. The accountant states that the business would then be more successful.

Counsel provided a 1997 Form 1099 showing that, during 1997, another caterer, located at the same address as the petitioner, paid $522,533.40 to the petitioner. The proposition which counsel intended to support by providing that document is unclear.

As was stated above, the petitioner must demonstrate that it had

the ability to pay the proffered wage on December 8, 1997, and has continued to have that ability.

During 1997, the petitioner's profit was less than $2,000. The petitioner could not have paid the proffered wage out of profits. If the petitioner had liquidated its net current assets, that would not have added to the petitioner's ability to pay, as the petitioner's current assets during that year were overwhelmed by the petitioner's current liabilities.

As to 1997, counsel's argument on appeal is twofold. Supported by the accountant's letter, counsel argues that the petitioner's business would have been more efficient and more profitable if the petitioner had employed the beneficiary, and that the additional profits could be used to pay the proffered wage. Counsel also makes the related argument that hiring the beneficiary would directly reduce certain of the petitioner's expenses, notably, contractor labor and the expense of purchasing prepared food from other caterers, and that the amounts saved could be used to pay the proffered wage.

The argument that the petitioner's profits would increase, or that, during other years, its losses would diminish, as a result of hiring the beneficiary is speculative. The ability to pay the proffered wage is not demonstrated by the speculative increase in profits, or decrease in losses, which counsel and the accountant theorize would accompany hiring the beneficiary.

The accountant has stated that, during 1997, $19,000 paid to contract labor would have been obviated by hiring the beneficiary. The accountant did not state how he had derived that figure and did not present any evidence in support of that assertion. The record contains no indication of the amount of money paid to kitchen help during 1997, as opposed to other workers, such as waiters and waitresses. If all of that $19,000 was actually paid to kitchen personnel, nothing in the record segregates the amount paid to chefs and cooks from the amount paid to dishwashers and pot washers. An unsupported statement is insufficient to meet the burden of proof in these proceedings. See *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Even if the accountant is correct, that $19,000, added to all of the petitioner's profits during 1997, would have been insufficient to pay the proffered wage.

Counsel did not present any evidence of the petitioner's ability to pay the proffered wage during the years 1998 and 1999. As such, the petitioner has failed to demonstrate the ability to pay the proffered wage during those years.

During the petitioner's 2000 fiscal year, the petitioner suffered a loss, rather than making a profit, and the amount by which the petitioner's net current liabilities exceeded net current assets had increased by more than $100,000 since the petitioner's 1997 fiscal year. Neither profits nor assets could be used to pay the proffered wage during that year.

As to that year, the accountant asserted, in a letter submitted in response to the Request For Evidence, that the compensation of officers could be reduced by the amount of the proffered wage. That the officers would agree to forego that amount of compensation is questionable. In view of the failure of the petitioner to demonstrate the ability to pay the proffered wage in 1997, 1998, and 1999, however, we need not dwell on the accountant's assertion pertinent to the year 2000.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during 1997, 1998, 1999, and 2000. Therefore, the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date and continuing to the present.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.